



**THE WORKERS' COMPENSATION
RATING AND INSPECTION BUREAU**

September 18, 2006

CIRCULAR LETTER NO. 2030

To All Members and Subscribers of the Bureau:

**VOLUNTARY COMPENSATION AND EMPLOYERS LIABILITY COVERAGE
ENDORSEMENT – WC 00 03 11A**

The attached memorandum is being provided to offer guidance on the use of the Voluntary Compensation and Employers Liability Coverage Endorsement (WC 00 03 11A) in Massachusetts.

The Bureau is issuing the attached memorandum in response to requests for guidance from both the carrier and producer communities.

Ellen F. Keefe, CPCU
General Counsel

Attachment



**THE WORKERS' COMPENSATION
RATING AND INSPECTION BUREAU**

**Voluntary Compensation and Employers Liability Coverage Endorsement
NCCI Form WC 00 03 11A**

The Massachusetts Workers' Compensation Law is set forth in Chapter 152 of the Massachusetts General Laws. Section 25A of Chapter 152 requires employers to promote the health, safety and welfare of their employees by providing the compensation provided for by Chapter 152 for their employees ("*workers' compensation insurance*").

The purpose of the *Voluntary Compensation and Employers Liability Coverage Endorsement* ("Endorsement") is to provide the equivalent of *workers' compensation insurance* coverage for **employees** for whom *workers' compensation insurance* coverage is not required by Massachusetts law. The Bureau has held that the Endorsement cannot be used to provide *workers' compensation insurance* or voluntary compensation insurance for volunteers because volunteers are not employees as defined under Chapter 152.¹

What type of coverage is provided by the Endorsement?

The Endorsement provides voluntary compensation insurance, which is distinct from *workers' compensation insurance*. The *Massachusetts Workers' Compensation and Employers Liability Insurance Manual*, ("MA Manual"), which is approved by the Commissioner of Insurance, provides that the Endorsement can be used to provide employees with voluntary compensation coverage, but not *workers' compensation coverage*.²

Rule II. D. of the MA Manual describes voluntary compensation insurance as follows: *Voluntary compensation insurance does not provide workers' compensation coverage and is not available for*

¹ Chapter 152, section 1 defines an employee, in pertinent part, as every *person in the service of another under a contract of hire, express or implied, oral or written*. Massachusetts case law has generally held that one cannot be an employee without a contract, holding that unless there is a contract of hire, express, or implied, actual control of the person's work will not establish the relation of employer and employee. In addition, a recent Supreme Judicial Court (SJC) decision held that a Massachusetts sexual harassment statute does not apply to volunteers. That decision includes a statement by the SJC that "...the workers' compensation statute does not apply to volunteers..." See, *Lowery v. Klemm*, 446 Mass 572, 580 (2006).

If a person makes a claim for workers' compensation benefits, the determination as to whether that person is an employee or a volunteer is a question of fact that will be decided by the Department of Industrial Accidents or the Court.

² The Endorsement, which is published by the National Council on Compensation Insurance, Inc. ("NCCI"), has been approved by the Division of Insurance ("DOI") for use in Massachusetts. NCCI's *Basic Manual User's Guide* defines voluntary compensation as insurance *that provides coverage for workers for whom workers' compensation coverage is not required by law... Voluntary Compensation Insurance enables the employer to offer the equivalent of workers' compensation and employers' liability coverage for these types of employment. It is permitted for volunteers only where allowed by state law*. In Massachusetts, there is no law that specifically allows such coverage for volunteers.

employments subject to M.G.L. Chapter 152, as amended. This insurance affords the benefits of M.G.L. Chapter 152, as amended, as if the affected employees were subject to that law, even though the law does not require payment of benefits to such employees. The MA Manual also states that voluntary compensation insurance shall not provide compensation, medical or other benefits in excess of the statutory requirements in the M.G.L. Chapter 152, as amended.

The MA Manual definition is consistent with the plain language of both the *Workers' Compensation and Employers Liability Insurance Policy* ("Policy") and the Endorsement. The Policy states: *We will pay promptly when due the benefits required of you by the workers compensation law.* In contrast, the Endorsement states: *we will pay an amount equal to the benefits that would be required of you ...if you were subject to the workers' compensation law.*

Who is covered under the Endorsement?

The Endorsement provides voluntary compensation insurance for **employees** for whom workers' compensation insurance coverage is not required by law.

Under the Massachusetts statute, the types of employees for whom workers' compensation insurance is not required by law include certain masters and seamen, certain salespersons, certain taxicab operators, and a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer ("exempt employees").³

Use of the Endorsement in Massachusetts

The Endorsement may be used only to provide voluntary compensation insurance for those employees for whom workers' compensation insurance coverage is not required by law.⁴

The Endorsement should not be used to provide coverage for volunteers because the Endorsement applies only to employees.

August 2006

³ G.L. c. 152 section 1(4) provides in pertinent part: "*Employee*", every person in the service of another under any contract of hire, express or implied, oral or written, **excepting** (a) masters of and seaman on vessels engaged in interstate or foreign commerce, (b) persons employed to participate in organized professional athletics, while so employed if their contracts of hire provide for the payment of wages during the period of any disability resulting from such employment, (c) a salesperson affiliated with a real estate broker pursuant to an agreement which specifically provides compensation only in the form of commissions earned from the sale or rental of real property, (d) a salesperson who is a direct seller of consumer products on a buy-sell or deposit-commission basis other than in a retail establishment, all of whose remuneration is directly related to sales rather than amount of time worked and whose services are performed pursuant to a written contract providing that the direct seller will not be treated as an employee for Federal tax purposes, (e) a person who operates a taxicab company pursuant to an independent contract which specifically provides for a rental fee or other payment to the owner of such taxicab vehicle which is in no way related to the taxicab fares collected by such person; and provided, further, that such person is not treated as an employee for Federal tax purposes, (f) persons employed by an employer engaged in interstate or foreign commerce but only so far as the laws of the United States provide for compensation or liability for their injury or death, and (g) a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer, but not excepting a person conclusively presumed to be an employee under section twenty-six.

⁴ Voluntary compensation coverage for exempt employees would not be available, however, in the Assigned Risk Pool ("Pool"). In its role as Pool Administrator, the Bureau holds that Pool policies do not provide coverage beyond what is required under the statute. In accordance with MA Manual Rule XIII, the Pool does permit use of the Endorsement as it applies to Federal Employers Liability Act Coverage (Program II).

The Voluntary Compensation Maritime Coverage Endorsement (WC 00 02 03) should be used when providing voluntary compensation insurance, under Admiralty Law Program II - State Act Coverage, to an employee who is a master or member of the crew of a vessel.

VOLUNTARY COMPENSATION AND EMPLOYERS LIABILITY COVERAGE ENDORSEMENT

This endorsement adds Voluntary Compensation Insurance to the policy.

A. How This Insurance Applies

This insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must be sustained by an employee included in the group of employees described in the Schedule.
2. The bodily injury must arise out of and in the course of employment necessary or incidental to work in a state listed in the Schedule.
3. The bodily injury must occur in the United States of America, its territories or possessions, or Canada, and may occur elsewhere if the employee is a United States or Canadian citizen temporarily away from those places.
4. Bodily injury by accident must occur during the policy period.
5. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

B. We Will Pay

We will pay an amount equal to the benefits that would be required of you if you and your employees described in the Schedule were subject to the workers compensation law shown in the Schedule. We will pay those amounts to the persons who would be entitled to them under the law.

C. Exclusions

This insurance does not cover:

1. any obligation imposed by a workers compensation or occupational disease law, or any similar law.
2. bodily injury intentionally caused or aggravated by you.

D. Before We Pay

Before we pay benefits to the persons entitled to them, they must:

1. Release you and us, in writing, of all responsibility for the injury or death.
2. Transfer to us their right to recover from others who may be responsible for the injury or death.
3. Cooperate with us and do everything necessary to enable us to enforce the right to recover from others.

If the persons entitled to the benefits of this insurance fail to do those things, our duty to pay ends at once. If they claim damages from you or from us for the injury or death, our duty to pay ends at once.

E. Recovery From Others

If we make a recovery from others, we will keep an amount equal to our expenses of recovery and the benefits we paid. We will pay the balance to the persons entitled to it. If the persons entitled to the benefits of this insurance make a recovery from others, they must reimburse us for the benefits we paid them.

F. Employers Liability Insurance

Part Two (Employers Liability Insurance) applies to bodily injury covered by this endorsement as though the State of Employment shown in the Schedule were shown in Item 3.A. of the Information Page.

Schedule

Employees

State of Employment

Designated Workers Compensation Law

Notes:

1. Use this endorsement to afford voluntary compensation coverage pursuant to the **Basic Manual User's Guide**.
2. Use Voluntary Compensation Maritime Endorsement to provide Voluntary Compensation Coverage under Program II as described in the **Basic Manual User's Guide**.
3. Work in a monopolistic state fund state should not be included in the Schedule unless employers liability coverage is provided in that state by the Employers Liability Coverage Endorsement.
4. This endorsement may only be used in accordance with the provisions of MS 176.041 in Minnesota.
5. Various uses of this endorsement are illustrated below.

Schedule

Employees

State of Employment

Designated Workers Compensation Law

All officers and employees not subject to the workers compensation law.

Any state shown in Item 3.A. of the Information Page.

The state where the injury takes place.

All domestics, farm and agricultural workers.

Utah

Utah

All partners of the insured partnership.

Kansas

Kansas